

## Offshore Trusts: An Introduction (1 of 3)

In this series we will examine the key elements of Offshore Trusts, taking a particular interest in Isle of Man Trusts.

By **Paul Harvey**, 3rd February 2022

In this series we will examine the key elements of Offshore Trusts, taking a particular interest in Isle of Man Trusts. This is the first of three articles, and one that lays the foundation that we will build upon. This first article is aimed at those who have no prior experience with Trusts and those who wish to develop a deeper understanding of the constitution of a Trust. With that, some of the information may seem rudimentary to professionals but can at the very least act as a refresher.

The series will initially define the vehicle itself, breaking down the constituent elements of the Trust and who the relevant parties are and their features, responsibilities and general role in the Trust. The following articles will take a more considered view of the administration of the Trust and pitfalls to avoid, followed by the types of Trust and the reasons someone may implement them in their planning.

If you would like to read the other articles in the series you can find them here:

- [Offshore Trusts: Types and Uses \(2 of 3\)](#)
  
- [Offshore Trusts: Misunderstandings, Pitfalls and Solutions \(3 of 3\)](#)

This first article discusses the following subjects to help give a broad overview of Offshore Trusts:

- [What Does Offshore Mean?](#)
  
- [What is a Trust?](#)
  
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## **What Does Offshore Mean?**

For the sake of completeness, we will first define what we mean when we say something is 'Offshore'.

The term Offshore refers to any activity that takes place outside of the jurisdiction of residence. The Offshore jurisdiction will have a different legislative, regulatory and/or tax regime, which has traditionally provided the Ultimate Beneficial Owners (UBOs) of any offshore structure/asset with the opportunity to take advantage the benefits of that territory.

Therefore, an Offshore Trust is one that is settled and managed in a separate jurisdiction from the home country of its UBO. Popular offshore financial centres include island nations such as the Isle of Man, the Channel Islands, British Virgin Islands, but also landlocked locations including Zurich, Dublin, Dubai etc. - It is important to select a jurisdiction in good standing, such as the Isle of Man, that appears on the OECD's 'whitelist' and holds a [Moody's rating of Aa3 Stable](#).

## What is a Trust?

A Trust is a fiduciary agreement for the transfer of beneficial ownership. At its heart, this means a Trust is a legal arrangement with the Trustees for the management of assets which are usually administered for a specific purpose e.g. family wealth preservation, asset protection, tax optimisation, corporate incentive arrangements etc.

The details of the arrangement are contained within a Trust Deed, which is the constitutional document of the Trust. Trusts are not incorporated i.e. they are not a legal entity like a company or corporation. Therefore, a Trust does not benefit from the features of a legal entity, such as separate legal personality and limited liability e.g. it cannot make contracts or create charges in its own name. Instead, legal title of the assets is transferred to the Trustees, for which duties are owed – we will cover this in more depth in the next article within the series.

For there to be a bona fide Trust, there must be three certainties present:

	Did the Settlor of the Trust intend to obligate or place the duty on the Trustees?
Intention	This is tested objectively having regard to the reasonable man. If there isn't sufficient certainty of intent the Trust may be void for uncertainty.
	Assets must be placed in Trust from outset.
Subject Matter	The assets settled into Trust must be identifiable and clearly defined. If not, then the Trust may be void for uncertainty.
	Simply put, the objectives of the Trust must be clear as far as who the Beneficiaries are or could be. If it is not clear who can benefit from the Trust, it may be void for uncertainty.
Objects	

Unlike a UK Trust, which has a maximum lifespan of 125 years, since 2015, Isle of Man Trusts have been able to continue in perpetuity i.e. until the Trust prescribes, Trustees decide to wind up the Trust or the Trust fund runs out. This gives the Trust supreme flexibility, allowing advisers to plan or defer chargeable events efficiently – for example, making distributions that help with the Beneficiary's personal tax position. Isle of Man

Trusts can benefit successive generations indefinitely.

Another distinction between UK and Offshore Trusts is the requirement to register.

Since 2017 it has been mandatory for UK Trusts which are liable for UK taxes to register with HM Revenue & Customs (HMRC). In the Isle of Man there is currently no comparable requirement, so long as the income is derived from non-Isle of Man sources, and there are no Isle of Man resident beneficiaries. Where these requirements are met, the income and gains can roll-up free of tax.

Where an Offshore Trust has a liability, or becomes liable to any of the following UK taxes: Income Tax, Capital Gains Tax, Inheritance Tax, Stamp Duty Land Tax or Stamp Duty Reserve Tax, there is a requirement to register with HMRC. Recent changes require Offshore Trusts to also register with HMRC in certain other situations, such as the acquisition of and interest in UK real estate. However, it is common for Offshore Trusts to hold shares in an Offshore Company, such as an Isle of Man company, which in turn owns the assets and engages in any commercial or investment activity on the Trust's behalf - this creates further separation and facilitates further subsidiary companies as required.

Now that we've established the basic parameters of a Trust, we will now consider the parties of the Trust and their roles and responsibilities.

#### **Parties of the Trust: The Settlor**

The instigator of a Trust is known as the Settlor, and this is the party who places the assets into Trust - thus creating a Settlement. Any legal person can establish a Trust, meaning that the Settlor can be both a natural person or a body corporate.

The Settlor must transfer assets into the Trust for it to come into existence. Whilst it is typical for there to be one Settlor, it is possible for the Trust to have multiple Settlers who place assets into the same Trust. Furthermore, the Settlements do not need to be at the same time. Depending on the circumstances of the Settlor, this can require further consideration with regard to tax.

Within the Trust Deed, certain powers can be reserved to the Settlor; such as the appointment and removal of Trustees, and the power to appoint a Protector.

Where a Discretionary Trust is established, the Settlor can provide further guidance through producing a letter of wishes. This document guides Trustees' decisions in their management and distributions of the Trust assets.

Not to worry if there seem to be a lot of moving parts - usually the Settlor has been advised by a qualified professional, who will work with them throughout the planning process. This ensures that the type of Trust established meets the Settlor's objectives, helping to identify the most appropriate Trustees and who should benefit and when, configuring the operational aspects and advising of any tax considerations and/or consequences among other things. Following the planning process, if an Offshore Trust has been advised, a Trust Service Provider such as Dixcart is contacted to arrange the establishment of the Trust, and who usually provide Trustees in that Offshore jurisdiction.

### **Parties of the Trust: The Trustee**

When the Settlor places the assets in Trust, the legal title of those assets is passed to their appointed Trustees. The Trustees have strict obligations to manage the Trust Fund in accordance with the terms of the Trust Deed - these legal obligations allow Beneficiaries to enforce equitable rights in a court.

Whilst it is possible for the Settlor to be a Trustee, it is highly unusual and would defeat any tax planning objectives. In theory a Beneficiary could also be a Trustee, but this is normally excluded by the Trust Deed and would conflict with the Trustees' duties discussed below.

Each common law jurisdiction will have its own suite of pertinent legislation that the Trustees must abide by. In the Isle of Man, the relevant law includes the Trustee Act 1961, Trust Act 1995 and Trustee Act 2001 among other Acts. Many of these entrench and develop on previously existing common law doctrines, as well as add to them, to provide more clarity and certainty e.g. the Trustees duty of care in relation to powers of investment and the professional standards expected of them.

In fact, duty of care lies at the heart of the Trustee's role. All Trustees are beholden to fiduciary duties, like a company's Directors. This means that Trustees are jointly and severely liable for the actions they take (or don't take) in respect of the Trust. These general duties are briefly summarised below:

- Exercise reasonable care and skill, considering the capacity of their appointment and any specialist skill or knowledge i.e. acting as a

professional or lay Trustee etc.;

- To understand and carry out their obligations in line with the terms of the Trust;
- To maintain and act in the interest of the Beneficiaries, keeping it separate from their own assets;
- To avoid conflicts of interest e.g. situations where the Trustee may make decisions for personal gain, or gain of others by disadvantaging the Beneficiaries;
- To act fairly and with impartiality towards Beneficiaries;
- To exercise powers only for the purposes they have been given and in good faith
- To provide an accurate account of the Trust Fund upon the Beneficiary's request.

There is also a duty for the Trustee to act gratuitously unless otherwise stated within the terms of the Trust; but most modern arrangements make provision for reasonable remuneration.

In the UK, Trustees are not regulated and do not need to be licensed. However, in jurisdictions such as the Isle of Man, in addition to the statutory and common law protections available, Professional Trustees are regulated by the [Isle of Man Financial Services Authority](#) and licensed under the Financial Services Act 2008.

As you can see, being a Trustee can be a complex undertaking, not least due to the legal obligations and subsequent liabilities incurred by the appointment. Further to this, there can be tax implications to consider that may create further liabilities for the Trustees. In the interests of brevity, we will cover various relevant considerations and best practices relevant to the role of Trustee within our next article in this series.

When the Trust Deed is drafted, Beneficiaries or categories of Beneficiaries must be named. In doing so, the Settlor outlines who they wish to benefit, or to be eligible to benefit from the Trust. The Beneficiaries may benefit from:

- The income of the trust e.g. property rental or investment income,
- The capital of the Trust e.g. getting assets distributed to them under specific circumstances, or
- Both income and capital.

Remember, Trustees are normally excluded from benefitting, although as stated above, Professional Trustees can receive reasonable remuneration. There are types of Trusts where the Settlor can retain an automatic interest to the income during their lifetime, for example an Interest in Possession Trust - This will be discussed in the next article.

Choosing the Beneficiaries or categories of Beneficiary can be a tricky exercise for the Settlor, who must weigh up various considerations, such as:

- Is the Settlor married?
  - Does the current spouse need access to the fund?
  - Does the Settlor have a former spouse?
- Does the Settlor have children?
  - Does the Settlor have children from a previous relationship?
- Is anyone financially dependent on the Settlor?
  - Does the Settlor have any vulnerable dependents?

- Who does the Settlor find deserving?
  
- Are there any not-for-profits/charities that are close to the Settlor's heart?

The Trust Deed can also include exclusions, which can detail anyone who the Settlor does not wish to be considered.

The Trust Fund can be apportioned into a main fund and sub fund elements, ringfenced for certain Beneficiaries. In practical terms, sub funds are created for the Beneficiaries or categories of Beneficiaries which only they can benefit from.

Should the Settlor wish to amend the list of Beneficiaries or categories, depending on the type of Trust, they can make a Deed of Variation. In the instance of a Discretionary Trust, the settlor would supply an updated letter of wishes to the Trustees – remember this document is not binding upon the Trustees and is only persuasive – Depending on the powers conveyed upon the Trustees, they will then consider the actions required.

The nature of the Trust will define the rights which the Beneficiary may seek to enforce. For example Discretionary Trusts, which are now regularly used in modern Estate Planning or Succession Planning due to their flexibility. Such Trusts convey few rights upon the Beneficiary, as the management and distribution of the Trust property is at the Trustees' discretion. However, both Settlor and Beneficiary can take comfort in these circumstances from the Trustees fiduciary duties; whereby the assets must be managed in the best interests of the Beneficiaries.

#### **Parties of the Trust: The Protector**

Whilst not a mandatory requirement, the Settlor may choose to appoint a Protector from outset. The Protector of a Trust is an independent party who is not a Trustee, but is given powers under the Trust Deed. The Protector ensures the Trustees are administering the Trust in compliance with the Trust Deed and the Settlor's wishes.

Typically the Protector will be a trusted and qualified professional, who may already have a relationship with the Settlor or their family, such as a Solicitor or Financial Adviser.

The Protector effectively provides a backstop to Trustees abuse of powers. For example, where a Protector is appointed, it is usual for the Protector to reserve certain powers, have the power to veto specified administrative actions, or those actions can require their sign-off in order to be bona fide. The power most commonly given to a Protector is the power to appoint or remove Trustees, or to consent to a distribution.

Other than guiding particular Trustee actions, the role of Protector can provide comfort to the Settlor that the trust is being administered as intended. However, Settlers should err on the side of caution when considering whether to appoint a Protector and which powers to reserve for them, as this can lead to many issues in the effective and efficient management of the Trust.

### **Parties of the Trust: Third Parties**

Finally, with regards to the operation of the Trust Fund, the Trustees may seek to appoint various qualified professionals to ensure the best outcome for the Trust Fund and the Beneficiaries. The nature of the settled assets will determine which professional services are required, but these can typically include:

- Investment Managers
  
- Property Managers
  
- Tax Advisors

### **Working with a Trust Service Provider**

Dixcart have been providing Trustee Services and guidance for 50 years; assisting clients with the effective structuring and efficient administration of Offshore Trusts.

Our in-house experts and senior employees are professionally qualified, with a wealth of experience; this means we are well placed to support and take responsibility for the

Offshore Trust, acting as Trustee and providing specialist consultancy services where appropriate. If required, the Dixcart Group can also assist individuals who require tax and wealth planning services.

We have developed an extensive range of offerings, which includes an array of Isle of Man structures. From pre-establishment planning and advice to the day-to-day management of the vehicle and troubleshooting issues, we can support your goals at every stage.

### **Get in touch**

If you require further information regarding the use of Offshore Trusts, or Isle of Man structures, please feel free to get in touch with Paul Harvey at Dixcart:

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